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Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform

By SUSAN F. FRENCH*

Any mechanical rule for the disposition of a lapse in the residue—whether it be by the common law in favor of intestacy or, oppositely, leading to survivorship, or by statutory provision—is, standing alone, likely to be quite arbitrary.¹

If the intended beneficiary of a will dies before the testator, the testamentary gift lapses and passes either to the testator's residuary or to intestate takers. Widespread unhappiness with this disposition of the decedent's property led to almost universal adoption of antilapse statutes in the United States and England,² beginning in the late eighteenth century.³ When they apply, the antilapse statutes pass the property to the issue, heirs, or devisees of the predeceasing beneficiary, instead of to the residuary legatees or heirs of the testator.

Antilapse statutes based on the eighteenth-century model have been enacted in every state except Louisiana.⁴ They have a worthy purpose and can be useful tools for making a disposition of the property that the testator probably would have wanted. Experience has shown, however,

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1. Estate of Burke, 48 N.J. 50, 62, 222 A.2d 273, 279 (1966) (Hall, J.).

2. Halbach, *Future Interests: Express and Implied Conditions of Survival* (pt. 1), 49 CALIF. L. REV. 297, 305 (1961).

3. The first antilapse statute in the United States was adopted by Massachusetts in 1783. See *infra* note 16.

4. See *infra* note 42 (complete list of antilapse statutes in the United States), APPENDIX.

that they often require dispositions the average testator would not want.⁵ These uneven results are largely the product of shortcomings in the eighteenth-century model on which current antilapse statutes are based. The antilapse statutes are blunt instruments that should be refined for use in the twentieth century. This Article presents a blueprint for their reform.

This Article first describes the lapse doctrine and the problems it creates, then turns to the solutions adopted by the two early statutes that provided the basic model for all the others. After an overview of the statutes' operation and shortcomings, the Article proceeds with a detailed analysis of the antilapse statutes in force in the United States today. It then presents cases that illustrate the practical working of the statutes. The cases not only demonstrate substantial deficiencies in the design of all the statutes, but also show that courts too often have been unwilling or unable to reach sound results in lapse cases because of evidentiary limitations imposed by the statutes or because of the weight given by judicial doctrine to survival requirements. The Article also analyzes special problems caused by class gifts.⁶

Finally, having detailed the problems presented by current judicial and statutory approaches to the lapse problem, the Article suggests taking a different approach to the lapse problem and relaxing the evidentiary limitations. The Article then discusses the outlines for statutory implementation of the new approach⁷ and proposes a sample statute.⁸ Drawn on the basis of two centuries of experience with antilapse statutes, the reform proposal should merit serious consideration by every state legislature.

The Lapse Problem and the Shortcoming of Antilapse Statutes

The problem addressed by antilapse statutes is lapse.⁹ Lapse occurs

5. See *infra* notes 88, 94, 98, 102 & accompanying text.

6. The problem is well illustrated by *Drafts v. Drafts*, 114 So. 2d 473 (Fla. Dist. Ct. App. 1959). See *infra* notes 150-51 & accompanying text.

7. The purpose of the statutes should be to accomplish what the average testator would have wanted given the unforeseen death of the devisee.

8. See *infra* notes 159-61 & accompanying text.

9. Literature on the lapse doctrine and antilapse statutes includes: 3 AMERICAN LAW OF PROPERTY § 14.14 (J. Casner ed. 1952); T. ATKINSON, LAW OF WILLS § 140 (2d ed. 1953); 1 T. JARMAN, A TREATISE ON WILLS ch. XI (6th ed. 1910); 6 W. PAGE, PAGE ON THE LAW OF WILLS § 50.1-24 (Bowe-Parker rev. ed. 1962); 3 J. WOERNER, A TREATISE ON THE AMERICAN LAW OF ADMINISTRATION §§ 434-438 (W. Woerner 3d ed. 1923); Bordwell, *The Statute Law of Wills*, 14 IOWA L. REV. 428 (1929); Casner, *Class Gifts—Effect of Failure of Class Member to Survive the Testator*, 60 HARV. L. REV. 751 (1947); Chaffin, *The Time Gap In Wills: Problems Under Georgia's Lapse Statutes*, 6 GA. L. REV. 268 (1972); Cooley, "Lapse

when a transfer attempted by will fails because the intended recipient dies before the testator.¹⁰ The problem is a fairly common one because there is often a considerable period of time between the execution of a will and the death of the testator, during which some of the intended beneficiaries may die. Proper testamentary planning and drafting to provide alternative takers can avoid the problem, but not all lawyers are careful drafters and not all testators consult lawyers. Furthermore, some testators are either unable or unwilling to anticipate and to provide for the eventuality that some or all of their intended beneficiaries will predecease them.¹¹

Before the adoption of antilapse statutes, the death of a devisee before the death of the testator caused the property to pass under the residuary clause of the will or, if the lapse occurred in the residuary clause or if there was no residuary clause, by intestacy.¹²

This result often appeared to frustrate the intent of the testator, particularly when the residuary clause passed property out of the family or when intestacy dramatically altered the proportions in which the

Statutes" and Their Effects on Gifts to Classes, 22 VA. L. REV. 373 (1936); Fletcher, *A Critical Note on Lapse*, 8 GONZ. L. REV. 26 (1972); Mullen, *The Maryland Statute Relating to Lapsing of Testamentary Gifts*, 7 MD. L. REV. 101 (1943); Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856, 899-903 (1960); Waggoner, *Future Interests Legislation: Implied Conditions of Survivorship and Substitutionary Gifts Under the New Illinois "Anti-Lapse" Provision*, 1969 U. ILL. L.F. 423; Comment, *Wills—Application of Florida's Antilapse Statutes to Class Gifts*, 14 U. MIAMI L. REV. 702 (1960); Comment, *Disinheritance and the Anti-Lapse Statute*, 26 WASH. & LEE L. REV. 105 (1969).

10. Traditional doctrine draws a distinction between lapsed transfers, in which the transferee dies between execution of the will and testator's death, and void transfers, in which the transferee dies before execution of the will. See *infra* notes 55, 57-59 & accompanying text for a list of states that have retained this distinction. See also *infra* notes 147-51 & accompanying text for a discussion of whether this distinction should be drawn in class gifts.

11. The English Commissioners on the Revision of the Law of Real Property, whose report resulted in passage of the Wills Act, 1837, 7 Will. 4 & 1 Vict., ch. 26, explained the genesis of the lapse problem as follows:

It is true that the event of death might always be provided for, but it is found in practice that such provision is very rarely made. A Testator does not contemplate that the immediate objects of his bounty, and especially his children, will die before him; he does not like to encumber his Will with provisions which appear to be unnecessary, and he imagines that if the event should happen, he shall be able to alter his Will. His legal Advisers think the chance that such an event will happen and will not be provided for is too slight an inducement for the trouble of inserting clauses to meet it, and in truth it would often be difficult to determine how far such provisions should be carried.

ENGLISH COMMISSIONERS ON THE REVISION OF THE LAW OF REAL PROPERTY, FOURTH REPORT 73 (Gr. Br. 1833) [hereinafter cited as ENGLISH COMMISSIONERS].

12. Under old common law, lapsed devises of real property passed intestate and not under the residuary clause. See ENGLISH COMMISSIONERS, *supra* note 11, at 74.

branches of the family shared the estate.¹³

For example, if the testator made preresiduary devises to his children and left the residue of the estate to charity, the death of a child before the testator caused the child's gift to lapse, passing the property intended for the child to the charity under the residuary clause. As a result of the lapse, the amount passing to the charity was greater than anticipated by the testator and the amount retained in the family was less. If the predeceased child was survived by issue, the lapse cut out that child's branch of the family. Even if the child died without issue, the lapse cut off the predeceased child's spouse, creditors, or other beneficiaries. Another situation in which lapse appeared to frustrate the testator's intent occurred when the testator left the residue of the estate to his children, and one or more predeceased the testator leaving surviving issue. Lapse caused the predeceased child's share to pass intestate to all of the testator's surviving children and to the issue of deceased children by right of representation. Because the surviving children already took a share of the estate under the residuary clause, intestate distribution of the deceased child's share reduced the amount distributable to that branch of the family and increased the shares of the survivors.¹⁴ In both instances, the result probably was not one that the ordinary testator would have wanted.¹⁵

In 1783, Massachusetts adopted the first statute aimed at the

13. The English Commissioners explained the problem as they saw it:

The rule, that gifts lapse if the person to whom they are made dies in the lifetime of the Testator, sometimes operates with great hardship, and defeats in many cases the intention of the Testator. When an estate is devised to a person in tail with remainder to another, it is manifestly the intention of the Testator that the tenant in tail and his issue should take, and that the person to whom the remainder is given should not take until all the issue of the intended tenant in tail have failed; and yet if such intended tenant in tail die in the Testator's lifetime, leaving issue, and the Testator is not aware of his death, or neglects to alter his Will, the issue are wholly excluded in consequence of the gift to the parent having lapsed, and the remainder-man obtains the Testator's estates. . . . In another usual case, where a Testator gives his property among his children, and a daughter or other child dies before him leaving a family, such family are disappointed. In all these cases, if the issue or family were to become entitled to the property given to their parent, the person to whom the remainder or residue is given would still be entitled to the property intended for him by the Testator, and would have no reason to complain.

Id.

14. Because debts and expenses are chargeable first to intestate property, at least in California, the family of the predeceased child might receive little or nothing. See, e.g., *Estate of Hall*, 183 Cal. 61, 190 P. 364 (1920).

15. In England, the lapse doctrine posed additional problems. Because of the primogeniture system of inheritance, if real property was left to a younger son or daughter who predeceased the testator, the property passed intestate to the eldest son, cutting out the family of the intended beneficiary entirely. 2 W. BLACKSTONE, *LAW OF ENGLAND* *213.

problems caused by lapse.¹⁶ The statute addressed the problems by providing, in effect, that a devise to any blood relative of the testator who had issue surviving the testator did not lapse, but passed instead to the surviving issue.¹⁷ In 1810, Maryland went even further and adopted a statute that prevented lapse altogether. Its statute provided that property intended for a predeceased devisee should pass instead to his heirs or devisees.¹⁸ The Massachusetts statute is based on the assumption that the ordinary testator would prefer that the issue of a predeceased relative receive the property rather than the residuary or intestate takers. The Maryland statute assumes that the testator would prefer that the intended beneficiary, whether related or not, have power to dispose of the property, rather than having it pass to the residuary or intestate takers. These two statutes provided the basic models on which all subsequent antilapse statutes have been constructed.¹⁹

Both statutes are based on the presumption that the usual testator would not intend that a devise to anyone in the protected class should lapse if the devisee predeceased the testator. In other words, both statutes assume that the testator would not want the residuary or intestate takers to receive the property intended for the predeceased devisee. The only difference between the two statutes is that Massachusetts limited this presumption to the situation in which the devisee is related to the testator and dies leaving issue; Maryland applied it to all devises.

In the two family situations described above, the assumptions underlying the antilapse statutes appear to be sound. The usual testator probably would prefer to avoid lapse when the lapsed devise would pass out of the family, or when it would pass to surviving family members in an overall distribution that resulted in substantially unequal treatment of

16. 1783 Mass. Acts, ch. 24, § 8, *cited in* MASS. REV. STATS. ch. 62, § 24 (1836). The statute provided:

When a devise of real or personal estate is made to any child or other relation of the testator, and the devisee shall die before the testator, leaving issue who survive the testator, such issue shall take the estate so devised, in the same manner as the devisee would have done, if he had survived the testator; unless a different disposition thereof shall be made or required by the will.

MASS. REV. STATS. ch. 62, § 24 (1836).

17. *Id.*

18. 1810 Md. Laws, ch. 34, § 4. The English antilapse statute, Wills Act, 1837, 7 Will. 4 & 1 Vict., ch. 26, § 33, has elements from both the Massachusetts and Maryland statutes. Like Massachusetts, it covered only certain devisees, the lineal descendants of the testator in this case, but was as broad as Maryland's in its substitution. The substitution was accomplished by treating the predeceasing devisee as if he had died immediately after the testator. The English statute was amended in 1982 to limit the substitute takers to issue of the predeceasing devisee. Administration of Justice Act, 1982, ch. 53, § 19.

19. *See infra* notes 42-54 & accompanying text.

the family branches. However, the assumptions are highly questionable when applied to two other situations.

The first of these situations occurs when, at the time the will is drawn, there are some living members of the generation closest to the testator and some deceased members with living issue. The testator gives larger shares of the estate to the members of the closer generation. Then, the members of the closer generation predecease the testator, leaving issue who survive. Under most antilapse statutes, the surviving issue of the older generation member will take the devise, producing an inequitable distribution among the testator's surviving issue who are all of the same generation.

For example, the testator makes a will when two of the testator's three children have died, leaving issue. The testator leaves five hundred dollars to each grandchild, including the issue of the living child, and leaves the residue to the living child.²⁰ This child then predeceases the testator, survived by issue. Under the antilapse statute, the grandchildren who are issue of the child living when the will was drawn take not only their five-hundred dollar legacies, but also the residue of the estate, while the other grandchildren take only their five-hundred dollar legacies. If the devise lapsed, the bulk of the estate would pass intestate to all the grandchildren equally. In this situation, preventing the lapse runs counter to the usual wishes of the ordinary testator.²¹

The second situation in which the antilapse statutes may not carry out the wishes of the usual testator arises when the testator leaves all of his property to a single generation, but prefers some members of that

20. It is not uncommon to find people who favor a living child over the issue of a deceased child. In a survey of 750 people living in Alabama, California, Massachusetts, Ohio, and Texas, respondents were asked how they would distribute their estate among a surviving son with no issue, the single child of a deceased son, and the two children of another deceased son. Most people gave a larger share to the living son than to the issue of the deceased sons. Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RESEARCH J. 319, 384. This same problem can arise when the testator leaves all or most of her estate to her surviving siblings and gives minimal amounts to her nieces and nephews, some of whom are children of deceased siblings. The testator's preference for the surviving siblings might be based on the particular needs and situation of the sibling, or on the fact that the testator feels closer to his or her surviving brothers and sisters than to the nieces and nephews.

21. Three empirical studies have found that 87% to 95% of the people surveyed would treat their grandchildren equally, even though they might leave a greater share, or the entire estate, to a living child than to the issue of a deceased child. They not only would not continue the preference for the living child to his children, but they would not adopt a stirpetal distribution. Fellows, Simon & Rau, *supra* note 20, at 383; Fellows, Simon, Snapp & Snapp, *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.F. 717, 741; Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1111 (1978).

generation over others. When the preferred members predecease the testator leaving issue, antilapse statutes pass the property to the issue of the preferred beneficiaries, excluding the other members of the older generation, or their issue, if they have died. The statutes' assumption that the testator's preference for a member of the older generation would have extended to that person's issue seems questionable.

For example, the testator has three siblings who are alive when the will is drawn and leaves his estate to one of them, who then dies before the testator.²² Under the antilapse statutes, the issue of the preferred sibling takes all of the estate, excluding the other siblings or the other nieces and nephews who are their issue, if they also have died.²³ Lapse of the devise would result in a more equal distribution of the property among the family branches.

The problem in both of these situations is that the antilapse statute perpetuates a preference for members of one generation into the next generation, without any evidence that the testator would have wanted to do so. If the studies are correct that the usual preference of testators is to treat equally-related relatives equally,²⁴ the antilapse statutes often will operate to frustrate intent in these situations. When the antilapse statutes operate to preserve property within the family by preventing it from

22. This same problem can arise when the testator prefers one or more of his living children over others. This preference may arise between minor and adult members of the same generation, when one member has greater needs than the others, or when the favored person has been particularly close and attentive to the testator. A preferred child is often the one who has taken care of the testator in his later years. M. SUSSMAN, J. CATES & D. SMITH, *THE FAMILY AND INHERITANCE* 97-103 (1970).

23. Although the empirical studies have not asked people how they would distribute property to brothers and sisters and to nieces and nephews, it seems reasonable to conclude that, as with children and grandchildren, the average testator would not want to continue inequality from one generation into the next. See *Clement v. Cauble*, 55 N.C. (2 Jones) 80 (1854), which stated:

If one dies, leaving seven children, this feeling suggests that they should share his estate equally, because they are all his children, so if one leaves as his next of kin seven grandchildren the same feeling suggests that they should share his estate equally, because they are all his grandchildren—equally nearly to him, and for that reason presumed to be equally the objects of his affection For the same reasons, if one leaves as his next of kin seven nieces and nephews, natural feeling suggests that they should share his estate equally, in the absence of anything to show that he intended to give a preference to those whose parents had the fewest number of children.

Id. at 92 (Pearson, J., dissenting).

The *Clement* court addressed the question of whether a stirpetal distribution carries out what the average testator intends. Similar logic would indicate that in the absence of evidence to the contrary, we should presume that testators would treat their nieces and nephews equally, even though they might favor one or more of their sisters and brothers.

24. See *supra* notes 21, 23.

passing to a nonfamily residuary taker, or when they operate to preserve equality of treatment among the branches of the family, they probably carry out the usual wishes of the ordinary testator.²⁵ When they produce or perpetuate inequality among branches of the family beyond the generation closest to the testator, they probably do not.²⁶ That the antilapse statutes do not attempt to distinguish between these situations is a substantial defect that alone would warrant reform. There are other significant problems as well.

Another defect in most antilapse statutes is in their failure to cover all those whom the testator regards as family²⁷ and whose gifts should be saved, either to prevent them from passing outside the family or to preserve equality. Only eight states' antilapse statutes apply to all devisees.²⁸ The rest, however, are limited in coverage. They vary from those limited to children of the testator to those that cover all relatives by consanguinity or by affinity. None of the limited statutes attempts to include gifts to people who, while not related by blood or marriage, are in fact treated like family by the testator.²⁹ Only eight states cover devises to the testator's spouse.³⁰

Another problem with current antilapse statutes is that the statutes and decisions often prevent consideration of evidence that the testator would not have wanted the statute applied.³¹ In many states, the statute's application is mandatory unless the will shows a contrary intent,³² or unless the will makes an alternate disposition of the property.³³ Courts have construed these statutes to prevent the introduction of extrinsic evidence to show that application of the statute frustrates, rather than furthers, intent. Thus, even though the underlying theory of the antilapse statutes is that they carry out the testator's probable intent, courts have been forced to apply the statutes to produce a result that probably violated the testator's intent when the evidence was extrinsic to

25. See *infra* notes 71-87 & accompanying text.

26. See *infra* text accompanying notes 88-107.

27. See Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 534 (1977). Professor Gaubatz identifies failure to recognize the "family of orientation," nonblood individuals with whom there are very close relationships, as a problem with intestacy statutes. "Given the state of recognition of less common family arrangements in society today, the efficacy of the law to provide for family protection must be questioned." *Id.*

28. See *infra* note 44.

29. See *infra* notes 119-28 & accompanying text.

30. See *infra* note 42.

31. See *infra* notes 66-69 & accompanying text.

32. See *infra* note 60.

33. See *infra* note 61.

the will.³⁴

Even when the language of the will has given the court some room to maneuver,³⁵ most courts have failed to recognize that in some family situations application of the statute is likely to frustrate the testator's intent. Instead of looking to the family situation to determine whether applying the statute would be appropriate,³⁶ courts have tended to apply mechanical rules³⁷ or to defer blindly to the apparent legislative judgment that, in all situations to which the statute could apply, the testator would rather preserve the gift than have it lapse.³⁸ Courts have not rec-

34. See, e.g., *Estate of Casey*, 128 Cal. App. 3d 867, 180 Cal. Rptr. 582 (1982); see also *Starkey v. District of Columbia*, 377 A.2d 382 (D.C. 1977); *Banker's Trust Co. v. Allen*, 257 Iowa 938, 135 N.W.2d 607 (1965). In these latter two cases, the courts refused to consider extrinsic evidence absent a finding that the language of the will was ambiguous. See also *infra* notes 91-93 & accompanying text.

35. Survival conditions and disinheritance clauses are the terms that most commonly give courts the opportunity to consider whether the statute should apply. See *infra* notes 67-69 & accompanying text.

36. In an analogous situation, Professor McGovern suggests that courts consider the actual facts of the case as an aid in determining which rule of construction would better carry out the testator's intent. McGovern, *Facts and Rules in the Construction of Wills*, 26 UCLA L. REV. 285, 286 (1978).

37. See, e.g., *Hummell v. Hummell*, 241 N.C. 254, 85 S.E.2d 144 (1954). In *Hummell*, the testatrix devised the estate to her three named children "or survivors." One child predeceased leaving issue. The court "sought in vain for authority upon which to hold the grandsons of the testatrix can share in her estate." *Id.* at 258, 85 S.E.2d at 147. According to the court, the survival condition in the will prevented the application of the antilapse statute. *Id.* In *Estate of Ulrikson*, 290 N.W.2d 757 (Minn. 1980), the court, in an equally mechanical application of its rule on survival conditions, refused to use the survival requirement to find an intent that the statute should not apply, even though the result was to produce a grossly disproportionate distribution among the testator's nieces and nephews. See *infra* notes 147-51 & accompanying text.

38. The courts often express this idea as a presumption that the statute should apply. See *Estate of Carroll*, 138 Cal. App. 2d 363, 291 P.2d 976 (1956), in which the court stated:

"The statutes which prevent lapse are not mandatory. They do not apply if the will shows that testator did not intend that the property should pass in accordance with the provisions of the statute. . . . If testator's intention to dispose of his property in case of the death of the first beneficiary, in some way inconsistent with the statute which prevents lapse, is shown with a reasonable degree of certainty, effect will be given to such intention. On the other hand the statute will apply unless testator's intention [to] exclude its operation is shown with reasonable[e] certainty."

Id. at 365, 291 P.2d at 977 (quoting the applicable rule from 4 W. PAGE, *supra* note 9, § 1423, at 181).

The court continued that "[i]t is likewise established that the court is bound to read into the will section 92 of the Probate Code [the antilapse statute]. . . . [T]he intention of the testator controls but to render the statute inoperative a contrary intent on the part of the testator must be plainly indicated." *Carroll*, 138 Cal. App. 2d at 365, 291 P.2d at 977 (quoting *Estate of Steidl*, 89 Cal. App. 2d 488, 490, 201 P.2d 58, 60 (1948)); see also *Henney v. Ertl*, 7 N.J. Super. 401, 406, 71 A.2d 546, 548 (1950) ("All doubts are to be resolved in favor of the operation of the statute and thus an alleged adverse intention such as comprehended by the statutory proviso must be made to appear with a reasonable degree of certainty."); *In re Estate*

ognized that the statutes were drawn with two situations in mind, in which applying the statute usually furthers the testator's dispositive plan, but that, in operation, they apply to other situations in which application usually will frustrate the testator's intent.³⁹ Only the New Jersey court, using its doctrine of "probable intent,"⁴⁰ has been willing to look to the nature of the gift within the family situation to determine whether the testator's intent would be approximated more closely by saving the gift or by allowing it to lapse.⁴¹ All of the antilapse statutes suffer from one or more of these substantive and procedural defects. They are all in need of reform.

Current Antilapse Statutes

There are several variables in the antilapse statutes in the United States and England.⁴² The major variable is the scope of coverage. The statutes range from those covering only gifts to children of the testator⁴³

of Burns, 78 S.D. 223, 229, 100 N.W.2d 399, 402 (1960) ("[I]f there is doubt concerning the testator's intent [to substitute another in place of the devisee] . . . it must be resolved in favor of the operation of the statute.").

39. See *supra* notes 25-26 & accompanying text.

40. See *infra* note 63.

41. See *Estate of Burke*, 48 N.J. 50, 222 A.2d 273 (1966); *Wagner v. Cook*, 44 N.J. 1, 206 A.2d 865 (1965).

42. ALA. CODE § 43-8-224 (1982); ALASKA STAT. § 13.11.240 (1972); ARIZ. REV. STAT. ANN. § 14-2605 (1975); ARK. STAT. ANN. § 60-410 (Supp. 1985); CAL. PROB. CODE § 6147 (West Supp. 1986); COLO. REV. STAT. § 15-11-605 (1973); CONN. GEN. STAT. ANN. § 45-276(a), (b) (West 1981); DEL. CODE ANN. tit. 12, § 2313 (1979); D.C. CODE ANN. § 18-308 (1981); FLA. STAT. ANN. § 732.603 (West 1976); GA. ANN. CODE § 113-812 (1973); HAWAII REV. STAT. § 560:2-605 (1976); IDAHO CODE § 15-2-605 (Supp. 1985); ILL. ANN. STAT. ch. 110 1/2, § 4-11 (Smith-Hurd 1978); IND. CODE ANN. § 29-1-6-1(2) (Burns Supp. 1985); IOWA CODE ANN. § 633.273-.274 (West 1964); KAN. STAT. ANN. § 59-615 (1983); KY. REV. STAT. § 394.400 (1984); ME. REV. STAT. ANN. tit. 18-A, § 2-605 (1981); MD. EST. & TRUSTS CODE ANN. § 4-403 (Supp. 1985); MASS. GEN. LAWS ANN. ch. 191, § 22 (West Supp. 1985); MICH. COMP. LAWS ANN. § 700.134 (West 1980); MINN. STAT. ANN. § 524.2-605 (West 1975); MISS. CODE ANN. § 91-5-7 (1972); MO. ANN. STAT. § 474.460 (Vernon Supp. 1985); MONT. CODE ANN. § 72-2-512 (1985); NEB. REV. STAT. § 30-2343 (1979); NEV. REV. STAT. § 133.200 (1979); N.H. REV. STAT. ANN. § 551:12 (1974); N.J. STAT. ANN. § 3B:3-35 (West 1983); N.M. STAT. ANN. § 45-2-605 (1978); N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 (McKinney 1981); N.C. GEN. STAT. § 31-42 (1984); N.D. CENT. CODE § 30.1-09-05 (1976); OHIO REV. CODE ANN. § 2107.52 (Page 1976); OKLA. STAT. ANN. tit. 84, § 142 (West 1970); OR. REV. STAT. § 112.395 (1983); 20 PA. CONS. STAT. ANN. § 2514(9) (Purdon 1975); R.I. GEN. LAWS § 33-6-19 (1984); S.C. CODE ANN. § 21-7-470 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 29-6-8 (1984); TENN. CODE ANN. § 32-3-104 to -105 (1984); TEX. PROB. CODE ANN. art. 68 (Vernon 1980); UTAH CODE ANN. § 75-2-605 (1978); VT. STAT. ANN. tit. 14, § 558 (1974); VA. CODE § 64.1-64.1. (Supp. 1985); WASH. REV. CODE ANN. § 11.12.110 (1967); W. VA. CODE § 41-3-3 (1982); WIS. STAT. ANN. § 853.27 (West 1971); WYO. STAT. § 2-6-106 (1980); Wills Act of 1837, § 33, 7 Will. & 4 Vict. ch. 26; see *infra* APPENDIX.

43. South Carolina's statute only applies to a devise to a child of the testator and does not

to those that cover gifts to anyone.⁴⁴ In between these two extremes, there are statutes that only apply to lineal descendants,⁴⁵ those that apply both to lineal descendants and to siblings,⁴⁶ those based on Uniform Probate Code section 2-605,⁴⁷ which include grandparents and the issue of grandparents,⁴⁸ those limited to heirs of the testator,⁴⁹ those that apply to any blood relative of the testator,⁵⁰ one that includes the testator's spouse, lineal descendants, and collaterals within six degrees,⁵¹ and those that apply both to blood relatives and to relatives by affinity.⁵²

The statutes also vary as to the identity of the takers substituted for the intended beneficiary. Maryland substitutes the heirs or devisees of the predeceased taker,⁵³ Iowa substitutes the heirs except for the spouse,⁵⁴ and all other states substitute the issue. The statutes also differ in their application to void gifts, to class gifts, and to void class gifts. Twenty-nine statutes expressly apply to void gifts as well as to lapsed gifts.⁵⁵ Thirty-one statutes expressly apply to class gifts.⁵⁶ Twenty-two statutes expressly apply to class gifts whether the class member dies

include grandchildren or other lineal descendants. *Logan v. Brunson*, 56 S.C. 7, 33 S.E. 737 (1899).

44. The District of Columbia, Georgia, Kentucky, Maryland, New Hampshire, Rhode Island, Tennessee, and West Virginia fall into this group. *See supra* note 42. Iowa's statute originally covered any devisee, but it was amended in 1963 to except the spouse of the testator, whose devise "shall lapse . . . unless from the terms of the will, the intent is clear and explicit to the contrary." IOWA CODE ANN. § 633.274 (West 1964). Kansas' statute applies to spouses, but is otherwise limited to lineal descendants and relatives within the sixth degree. *See supra* note 42.

45. Arkansas, Illinois, Indiana, Mississippi, and Texas make up this group. *See supra* note 42.

46. Connecticut (child, grandchild, sibling), New York (issue or sibling), and Pennsylvania (issue, sibling, sibling's child) make up this group. *See supra* note 42.

47. UNIF. PROB. CODE § 2-605 (1983).

48. Alabama, Alaska, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Maine, Minnesota, Montana, New Jersey, North Dakota, Virginia, and Wyoming are in this group. *See supra* note 42.

49. North Carolina (any devisee whose issue would have been an heir of the testator) and Utah fall into this category. *See supra* note 42.

50. Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, Oregon, South Dakota, Vermont, Washington, and Wisconsin make up this group. *See supra* note 42.

51. Only Kansas takes this approach. *See supra* note 42.

52. California was in the group that limited coverage to blood relatives of the testator until the 1983 probate code revisions. CAL. PROB. CODE § 92 (West 1956). The new California statute, effective January 1, 1985, defines the "devisee" covered by the antilapse statute as kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator. CAL. PROB. CODE § 6147(a) (West Supp. 1986).

53. MD. EST. & TRUSTS CODE ANN. § 4-403 (Supp. 1985).

54. IOWA CODE ANN. § 633.273-.274 (West 1964).

55. Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kentucky, Maine, Michigan, Minnesota, Montana, Nebraska, New

before or after execution of the will.⁵⁷ Five expressly do not apply to class members who die before execution of the will.⁵⁸ At least one statute does not apply to void gifts to individuals as well as to classes.⁵⁹

In twenty-three states, the statute requires that it be applied unless the will shows a contrary intent,⁶⁰ or unless the will makes an alternate disposition of the property.⁶¹ The common-law rule is probably the same in the other states⁶² except New Jersey, where the court looks to relevant extrinsic evidence to determine the testator's probable intent.⁶³ Finally, there are three antilapse statutes that, under some circumstances, apply

Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Dakota, Tennessee. Utah, Virginia, West Virginia, Wisconsin, and Wyoming are in this group. *See supra* note 42.

56. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Kentucky, *see* KY. REV. STAT. § 394.410 (1984), Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Wisconsin, and Wyoming are in this group. *See supra* note 42.

Eight other states have cases applying antilapse statutes to class gifts. *Clifford v. Cronin*, 97 Conn. 434, 117 A. 489 (1922); *Guitar v. Gordon*, 17 Mo. 408 (1853); *Gianoli v. Gabaccia*, 82 Nev. 108, 412 P.2d 439 (1966); *In re Estate of Reagan*, 533 P.2d 1004 (Okla. Ct. App. 1975); *Moore v. Dimond*, 5 R.I. 121 (1858); *Hoverstad v. First Nat'l Bank & Trust Co.*, 76 S.D. 119, 74 N.W.2d 48 (1955); *Burch v. McMillin*, 15 S.W.2d 86 (Tex. 1929); *In re Hutton's Estate*, 106 Wash. 578, 180 P. 882 (1919) (dictum). There is case law in Georgia, Iowa, and New Hampshire refusing to apply the antilapse statute to class gifts. *Graham v. Patton*, 231 Ga. 391, 202 S.E.2d 58 (1973); *Renney v. Kimberly*, 211 Ga. 396, 86 S.E.2d 217 (1955); *In re Estate of Kalouse*, 282 N.W.2d 98 (Iowa 1979); *Campbell v. Clark*, 64 N.H. 328, 10 A. 702 (1887).

57. Alabama, Alaska, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Tennessee, Utah, Virginia, and Wyoming make up this group. *See supra* note 42.

58. California, Maryland, New York, Oregon, and Wisconsin have such a restriction. *See supra* note 42. The California statute provides: "A devisee under a class gift is a devisee for the purpose of this subdivision unless his or her death occurred before the execution of the will and that fact was known to the testator when the will was executed." CAL. PROB. CODE § 6147(b) (West Supp. 1986).

59. Maryland's statute applies only to a legatee who dies after execution of the will. MD. EST. & TRUSTS CODE ANN. § 4-403(a) (Supp. 1985); *Billingsley v. Tongue*, 9 Md. 575 (1856).

60. Arkansas, California, Florida, Iowa, Maryland, North Carolina, Rhode Island, Virginia, and Wisconsin have such statutes. *See supra* note 42.

61. These statutes take several forms: Connecticut (no provision has been made in the will for such contingency); Delaware (no provision for different distribution); District of Columbia, Kansas, Kentucky, Massachusetts, Ohio, Tennessee, and Vermont (unless a different disposition is made or required by the will); Illinois (unless the testator expressly provides otherwise in his will); Nevada (in the absence of a provision in the will to the contrary); New York, Oregon, and West Virginia (unless the will provides otherwise). *See supra* note 42.

62. *See* 6 W. PAGE, *supra* note 9, § 50.11, at 82.

63. *Estate of Burke*, 48 N.J. 50, 222 A.2d 273 (1966); *Wagner v. Cook*, 44 N.J. 1, 206 A.2d 865 (1965); *see* *Fidelity Union Trust Co. v. Robert*, 36 N.J. 561, 178 A.2d 185 (1962) (good discussion of the "probable intent" doctrine).

to certain future interests.⁶⁴ Thus, there is a broad variation in the scope, substantive provisions, and applicability of antilapse statutes.⁶⁵

Operation of the Antilapse Statutes

Because most courts refuse to consider extrinsic evidence in determining whether to apply an antilapse statute,⁶⁶ almost all of the reported cases involve wills containing survival requirements,⁶⁷ disinheritance clauses,⁶⁸ or other language that provides a basis for arguing that appli-

64. The Illinois antilapse statute was amended in 1969 to impose a survival requirement on future interests created by will that are not, or do not become, indefeasibly vested at the time of the testator's death, or at any time thereafter before becoming possessory. ILL. ANN. STAT. § 4-11 (Smith-Hurd 1978). The statute provides for substitution of issue for beneficiaries who are descendants of the testator.

A Tennessee statute enacted in 1927 substitutes the surviving issue for any class member who dies before the time for distribution or enjoyment, whether related to testator or not, "unless a clear intention to the contrary is manifested by the will, deed or other instrument." TENN. CODE ANN. § 32-3-104 (1984). The statute was enacted to compensate for Tennessee's doctrine that all gifts to classes were contingent on survival to the date of distribution or enjoyment. See *Walker v. Applebury*, 218 Tenn. 91, 400 S.W.2d 865 (1965); *Moulton v. Dawson*, 215 Tenn. 184, 384 S.W.2d 233 (1964).

A similar statute is in effect in Pennsylvania. It provides that, in construing a devise to a class (other than a devise to heirs, next of kin, relatives, or family—all of which are covered by a separate statute), the class shall be ascertained at the time the devise is to take effect in enjoyment, "except that the issue then living of any member of the class who is then dead shall take per stirpes the share which their deceased ancestor would have taken if he had then been living." PA. CONS. STAT. ANN. § 2514(5) (Purdon 1975).

65. See *infra* APPENDIX (chart showing differences among the statutes).

66. See *supra* notes 60-61.

67. Many cases have held that survival requirements manifest an intent that the statute should not apply. See *Estate of Todd*, 17 Cal. 2d 270, 109 P.2d 913 (1941); *Starkey v. District of Columbia*, 377 A.2d 382 (D.C. 1977); *Vollmer v. McGowan*, 409 Ill. 306, 99 N.E.2d 337 (1951); *Banker's Trust Co. v. Allen*, 257 Iowa 938, 135 N.W.2d 607 (1965); *In re Estate of Stroble*, 6 Kan. App. 2d 955, 636 P.2d 236 (1981); *In re Holtforth's Estate*, 298 Mich. 708, 299 N.W. 776 (1941); *In re Estate of Evans*, 193 Neb. 437, 227 N.W.2d 603 (1975); *In re Wintermute*, 97 N.J. Eq. 289, 127 A. 218 (1925); *In re Northrip's Will*, 258 A.D. 71, 15 N.Y.S.2d 789 (1939), *aff'd per curiam*, 282 N.Y. 797, 27 N.E.2d 205 (1940); *In re Estate of Howes*, 35 Misc. 2d 109, 229 N.Y.S.2d 469 (Surrogate's Ct. 1962); *In re Loeb's Estate*, 34 N.Y.S.2d 65 (Surrogate's Ct. 1942); *Hummell v. Hummell*, 241 N.C. 254, 85 S.E.2d 144 (1954); *Cowgill v. Faulconer*, 57 Ohio Misc. 6 (1978); *Shalkhauser v. Beach*, 14 Ohio Misc. 1 (1968).

The following cases apply the statute despite survival conditions: *Schneller v. Schneller*, 356 Ill. 89, 190 N.E. 121 (1934); *Galloupe v. Blake*, 248 Mass. 196, 142 N.E. 818 (1924); *Rivenett v. Bourquin*, 53 Mich. 10, 18 N.W. 537 (1884); *In re Estate of Ulrikson*, 290 N.W.2d 757 (Minn. 1980); *Detzel v. Nieberding*, 7 Ohio Misc. 262 (1966); *In re Estate of Kehler*, 488 Pa. 165, 411 A.2d 748 (1980); *Wells v. Wedehase*, 78 S.D. 223, 100 N.W.2d 399 (1960); *In re Estate of Allmond*, 10 Wash. App. 869, 520 P.2d 1388 (1974).

68. See, e.g., *Estate of Roberts*, 9 Cal. App. 3d 747, 88 Cal. Rptr. 396 (1970); *Estate of Pfadenhauer*, 159 Cal. App. 2d 686, 324 P.2d 693 (1958); *Estate of Carroll*, 138 Cal. App. 2d 363, 291 P.2d 976 (1956); *In re Estate of Sullivan*, 31 Cal. App. 2d 527, 88 P.2d 225 (1939); *In re Estate of Murphy*, 9 Cal. App. 2d 712, 50 P.2d 828 (1935); *Fischer v. Mills*, 248 Iowa 1319,

cation of the statute would be contrary to the testator's intent.⁶⁹ There are a few cases, however, in which the opponents simply assert that the result reached by applying, or refusing to apply, the statute is wrong.⁷⁰

The following sections present a representative sample of cases to illustrate the application of the antilapse statutes to a variety of dispositive plans. They show that courts seldom take into account the statute's impact on the dispositive plan in deciding whether the antilapse statute should apply. Instead, they rely on factors like the presence or absence of survival requirements or disinheritance clauses or a presumption that application of the statute will promote the ordinary testator's intent. Measured against the results of empirical studies of the preferences of ordinary testators, it is apparent that the usual judicial and statutory approaches produce very haphazard results.

Application of the Statute Saves a Gift for the Family

In *Detzel v. Nieberding*,⁷¹ a survival requirement provided the basis for claiming that the antilapse statute should not apply. In that case, the testator's will left legacies to her sister, Mary, and to several other individuals, and left the residue of the estate to charity. The will added that the legatees must "be living at the time of" the testatrix' death.⁷² Mary predeceased the testator, leaving a daughter. The court held that the

85 N.W.2d 533 (1957); *In re Carleton's Will*, 3 Misc. 2d 677, 151 N.Y.S.2d 338 (Surrogate's Ct. 1956); *In re McKeon's Estate*, 182 Misc. 906, 46 N.Y.S.2d 349 (Surrogate's Ct. 1944); *Bruner v. First Nat'l Bank*, 260 Or. 590, 443 P.2d 645 (1968).

69. See, e.g., *In re Estate of Sutro*, 139 Cal. 87, 72 P. 827 (1903) (will stated that a legacy was made as reparation for injury done to legatee by a scandalous charge); *Estate of Salisbury*, 76 Cal. App. 3d 635, 143 Cal. Rptr. 81 (1978) (devise of residue "including all failed and lapsed gifts" indicated intent that preresiduary devise should lapse); *Estate of Friedman*, 198 Cal. App. 2d 434, 18 Cal. Rptr. 252 (1961) (inclusion of substitute gift to granddaughter in one part of will did not indicate intent that she should not be substituted as taker under another part); *Brewer v. Curtis*, 30 Del. 503, 108 A. 673 (1920) (language in will increasing gift to testator's grandson upon the death of grandson's mother indicated intent that antilapse statute should not apply); *Hay v. Dole*, 119 Me. 421, 111 A. 713 (1920) (clear language in will indicating that gifts to legatees should lapse upon their deaths rendered antilapse statute inapplicable); *In re McFerren's Estate*, 365 Pa. 490, 76 A.2d 759 (1950) (language of will directing four out of fifteen legacies to lapse does not indicate intention of testator that all remaining eleven legacies should not lapse); *Keller v. Keller*, 287 S.E.2d 508 (W. Va. 1982) (provision for a "spendthrift trust" prevents operation of the statute).

70. See, e.g., *In re Estate of Sessions*, 171 Cal. 346, 153 P. 231 (1915); *In re Estate of Hittell*, 141 Cal. 432, 75 P. 53 (1903); *Estate of Casey*, 128 Cal. App. 3d 867, 180 Cal. Rptr. 582 (1982); see also *In re Estate of Kerk*, 624 P.2d 373 (Colo. Ct. App. 1981) (The court rejected argument made by intestate takers that the antilapse statute should be applied *only* to class gifts, and that, therefore, testator's entire estate devised to his predeceased sister, Rose, should pass to them rather than to Rose's children.).

71. 7 Ohio Misc. 262 (1966).

72. *Id.*

antilapse statute applied despite the survival requirement in the will.⁷³

Because application of the statute kept property intended for a family member within the family, the court's decision seems correct.⁷⁴ The court, however, did not mention this effect of applying the statute, and instead rationalized its decision on the ground that the statute applies unless the testator makes an alternative provision in the will.⁷⁵ The court treated the survival requirement as nothing more than a statement of the law, rather than as a manifestation of intent that, if the legatee predeceased the testator, the statute should not substitute the legatee's issue.

*Galloupe v. Blake*⁷⁶ also involved a residuary gift to charity and a claim that the court should not apply the antilapse statute because of a survival requirement in the will. In *Galloupe*, the testator's will included three clauses, each of which made a special gift to two cousins. The clauses were in the form "to X_1 and X_2 , the children of X , or the survivor." Only one of the six cousins named in the clauses survived the testator. Of the five predeceased cousins, three left issue. The court held that the antilapse statute applied, thus saving gifts to branches of the family that would have been cut out had the statute not applied. The court did not openly base its decision on the fact that the result carried out the average testator's likely dispositive preference under these circumstances, but instead stated that the decedent intended that the survivor provision apply only if there was a survivor.⁷⁷ These cases illustrate that antilapse statutes produce beneficial results when they prevent property intended for a family member from passing out of the family, but that courts do not expressly base their decisions on this ground. Thus, courts do not always interpret testamentary survival requirements so as to defeat a ben-

73. *Id.* at 274-75.

74. Interestingly, the case is criticized in *Shalkhauser v. Beach*, 14 Ohio Misc. 1 (1968), on the ground that inclusion of a survival requirement clearly indicates that the statute should not be applied. The court's opinion in *Detzel* is characterized as "clearly and completely erroneous." *Id.* at 6.

Another case in which *Detzel* was distinguished is *Day v. Brooks*, 10 Ohio Misc. 273 (1967), in which one provision of testator's will left \$300 to "all of my brothers who shall be living at the time of my decease." *Id.* at 283. The residue passed to five charities. All of the brothers predeceased the testator, leaving issue, and the court held that their issue were precluded by the survival requirement. The court distinguished *Detzel* on the ground that it was a gift to an individual, rather than to a class. *Id.* at 285. This may be a case when the result reached was equitable even though it passed property out of the family. Given the small amount of the legacies, it seems unlikely that testator intended them as other than mementos.

75. The court said that the testator specifically must dispose of the legacy in the event the legatee predeceases the testator. *Detzel*, 7 Ohio Misc. at 274.

76. 248 Mass. 196, 142 N.E. 818 (1924).

77. *Id.* at 200, 142 N.E. at 819.

eficial application of the antilapse statutes to preserve property in the family.

Application of the Statute Preserves Equality Among Family Branches

Situations in which applying the statute will preserve or promote equality of treatment within the family branches normally involve devises to all members of the same class at the same generational level and may include devises to others. These cases arise with gifts to siblings as well as with gifts to children.

In *Estate of Pfadenhauer*,⁷⁸ for example, testator's will, made in 1939, left one hundred dollars to her church and the residue as follows: one-third to her sister Susan, one-third to her sister, Kate, one-sixth to her niece Dora, and one-sixth to her niece Marguerite. The testator included a clause giving one dollar to anyone who contested the will, and stating that she purposely had not provided for anyone not named in the will. When the testator died in 1950, both Susan and Kate were dead. Susan's living descendants included six children and four grandchildren by a deceased child. Kate's descendants were testator's nieces, Dora and Marguerite.

Marguerite claimed that the disinheritance clause precluded Susan's descendants from claiming under the antilapse statute because they were not named in the will, so that Susan's one-third passed intestate—one-half to Dora and herself, and one-half to Susan's issue.⁷⁹ Because Dora and Marguerite took their mother's one-third under the antilapse statute in addition to the third given to them directly by the will, the two of them, representing one branch of the family, would have ended up with five-sixths of the estate. Susan's descendants, representing the other branch, would have received only one-sixth.

Rejecting Marguerite's argument, the court held that the testator's expressed intent to exclude the relatives not named in the will did not indicate an intention to exclude them as lineal descendants of the named devisee.⁸⁰ The court buttressed its conclusion by finding a clear intent to

78. 159 Cal. App. 2d 686, 324 P.2d 693 (1958).

79. *Id.* at 687, 324 P.2d at 695.

80. *Id.* at 689, 324 P.2d at 695. The court added:

While the intention clearly appears that these gifts were not to be interfered with by the claim of any unnamed relative, the very fact that she made no attempt to provide for a substitute in the event one of the named devisees or legatees predeceased her indicates an intention not to provide against the operation of § 92 [the antilapse statute], rather than the contrary.

Id. at 689, 324 P.2d at 696.

dispose of the entire estate by the will.⁸¹ The court also noted that if Susan had lived, she could have left her share to her descendants.⁸² The court did not rely on the fact that applying the statute promoted equal treatment of the family branches by allowing both branches to take under the will.

In *In re Estate of Sullivan*,⁸³ another case involving siblings, the testator left the residue of the estate to four named siblings. A clause in the will expressly omitted all heirs not mentioned and gave one dollar to anyone else who claimed a share in the estate. One brother predeceased the testator leaving issue, and the surviving siblings claimed the entire residue as a class gift. The court rejected the class gift argument and held that the disinheritance clause did not indicate an intent that the antilapse statute should not apply. The court did not base its decision on the fact that application of the statute maintained equality among the branches of the family.⁸⁴

One of the rare cases in which the court applied the antilapse statute because it carried out the policy of not disinheriting issue is *Schneller v. Schneller*.⁸⁵ In *Schneller*, the testator left the residue of his estate to his three children, "or to the survivors or survivor of them."⁸⁶ The will was executed in 1919, when none of testator's children had any children. When the testator died in 1931, one of his sons had died, leaving a

81. *Id.* at 688, 324 P.2d at 695.

82. *Id.* at 689, 324 P.2d at 696.

83. 31 Cal. App. 2d 527, 88 P.2d 225 (1939).

84. See also *Estate of Kehler*, 488 Pa. 165, 411 A.2d 748 (1980). *Kehler* is another case involving siblings. The testator left legacies of one thousand dollars each to two nephews, with directions that the gifts should lapse if the beneficiaries predeceased. He left the residue to four brothers and sisters, "and to the survivor or survivors of them." *Id.* at 166, 411 A.2d at 749. One brother predeceased the testator, leaving a daughter. The court held that the survival language in the residuary clause did not prevent application of the antilapse statute. The result was to maintain equality among the family branches. The court used the express lapse language of the pecuniary legacies to justify ignoring the survival language in the residuary clause, concluding that "[i]t cannot now be said with the requisite reasonable certainty that testator intended a lapse of residuary bequests under paragraph THIRD." *Id.* at 168, 411 A.2d at 750.

85. 356 Ill. 89, 190 N.E. 121 (1934). Another case involving children is *Rivenett v. Bourquin*, 53 Mich. 10, 18 N.W. 537 (1884). The will devised the estate to four children and provided "that in the event of either of my said sons or daughters dying before my death, then and in that case my said estate shall be divided among the survivors, or their legal representatives, share and share alike." *Id.* at 11-12, 18 N.W. at 537. At the time of execution all of the testator's children were living and unmarried. Later, a daughter married, had two children, and predeceased the testator. The court held that inclusion of a survival requirement and an alternative gift to legal representatives was ambiguous, and extrinsic evidence of testator's intent was admissible to show the testator's feelings toward her grandchildren and her statements about the grandchildren's share after the daughter's death. *Id.* at 13-14, 18 N.W. at 538-39.

86. *Schneller*, 356 Ill. at 91, 190 N.E. at 122.

daughter. Emphasizing the unnaturalness of disinheritance and the policy reasons against it, the court held that the statute should be applied, stating, "There is nothing beyond the bare use of the technical words of survivorship to indicate that he had in mind the disinheritance of one of his grandchildren who had lost its parent before the death of the testator."⁸⁷ These cases illustrate situations in which the antilapse statutes promote equal treatment among family branches. They also illustrate that courts tend to focus on the language of survival and inheritance clauses rather than the impact on the dispositive plan in deciding whether or not the antilapse statutes should be applied.

Application of the Statute Perpetuates Inequality Within the Family

Sometimes the antilapse statutes perpetuate unequal treatment of family members when it is unlikely that the testator would have intended that result. In *Estate of Casey*,⁸⁸ for example, application of the antilapse statute gave one group of grandchildren the bulk of the testator's estate. Under the circumstances, it seems highly unlikely that the testator would have intended that result. Testator had two daughters: Martha, who had four children, and Patricia, who had six. Testator drew her holographic will after Patricia's death, while Martha was still alive.

Testator gave a residence and certain shares of stock to Martha, and made two specific bequests to individual grandchildren, one to a child of Patricia, and one to a child of Martha. The residuary clause provided:

The remaining stocks to be sold and divided equally among the ten grandchildren. After . . . expenses . . . , any cash remaining in the savings account . . . in the Crocker Citizens Bank shall be given to Martha The shares of stock not otherwise mentioned shall be sold & the cash from them and that remaining in any & all other bank deposits shall be divided equally among the 10—grandchildren.⁸⁹

Daughter Martha predeceased the testator, and the question before the court was whether her four children should take everything left to her in the will by virtue of the antilapse statute, in addition to sharing the residue equally with the other six grandchildren, or whether all the estate except the two specific bequests to grandchildren should be divided equally among the ten. Because the will did not include any survival condition or disinheritance clause, Patricia's children were forced to argue that the will was ambiguous under the circumstances, so that the court should admit extrinsic evidence to show that the testator would

87. *Id.* at 96, 190 N.E. at 124.

88. 128 Cal. App. 3d 867, 180 Cal. Rptr. 582 (1982).

89. *Id.* at 872, 180 Cal. Rptr. at 584 (emphasis in original).

have intended equal treatment of the grandchildren.⁹⁰

The court held that the extrinsic evidence was properly excluded, and there was nothing in the will from which it could infer an intent that the antilapse statute should not be applied.⁹¹ The court refused to consider the fact that application of the statute produced an inequitable result. The court stated that, even if extrinsic evidence could have been introduced, it would not have prevented application of the statute.⁹² The court's treatment of this issue clearly indicates one of the problems with current judicial and statutory approaches to the lapse problem:

Assuming *arguendo* that the extrinsic evidence would have established that Elise [testator] constantly and fervently adhered to a pattern of absolute equality among her grandchildren in the area of gift giving, the most that it would establish is that *if she had contemplated* that Martha would predecease her she would have made different provisions. The controlling act is that she did not.

The antilapse statute is in some respects analogous to the laws of intestate distribution. The Legislature in establishing a pattern for intestate distribution created a hierarchy of beneficiaries which presumptively comports with what the average and ordinary individual would desire in disposing of his estate. This scheme operates when the decedent has been silent on the subject by failing to execute a will with the requisite formality.

Similarly, the antilapse statute expresses the Legislature's notion of what the average individual would desire in the case of a lapsed gift. When the testator is silent on the subject of a lapsed gift by failing to contemplate and provide for that eventuality, the statute operates.

Since the statute provides a pattern of distribution in the case of a lapsed gift which is to be preferred over use of a residual clause or intestacy, some formality, in the nature of a clearly expressed intent, is necessary to avoid its operation.⁹³

The opinion in *Casey* illustrates two of the shortcomings of the antilapse statutes: the statutes substitute the issue for a predeceased beneficiary of a given relationship to the testator regardless of the impact on the dispositive plan and the resulting distribution among family members; and the only evidence that can be used to prevent application of the statute is evidence that appears in the will. The opinion also illustrates a shortcoming of the judicial approach to antilapse statutes: the court refused to consider the impact of the statute on the dispositive plan as evidence of the testator's intent that the statute should not apply.

*Estate of Carroll*⁹⁴ is another case in which the testator left a dispro-

90. *Id.*

91. *Id.* at 874, 180 Cal. Rptr. at 585-86.

92. *Id.* at 873-74, 180 Cal. Rptr. at 585-86.

93. *Id.* (emphasis in original) (citations omitted).

94. 138 Cal. App. 2d 363, 291 P.2d 976 (1956).

portionate share of the estate to a member of the generation closest to the testator, who then predeceased the testator. Again, application of the antilapse statute resulted in a distribution among members of a younger generation that perpetuated the preference expressed at the older generation without any evidence that the testator would have wanted that result.

In *Carroll*, the testator's holographic will left all her property to her sister, Margaret. She provided that her only brother, Harry, and her nephews, including Margaret's son, were to get one dollar each. Testator's other nephews were sons of a predeceased brother and a predeceased sister. Margaret died the year before the testator. The court applied the antilapse statute, so that Margaret's son took the entire estate, to the exclusion of the other nephews.⁹⁵

The court reasoned that, although the bequest of a nominal sum is in effect a disinheritance, it is not evidence of an intent to disinherit the claimant if conditions change, such as the death of the claimant's parent.⁹⁶ The court did not appear to consider that under its ruling Margaret's son took the whole estate, even though the will had treated him exactly like the other nephews.

Although the court is clearly correct in holding that a general disinheritance clause should not preclude application of the antilapse statute, it should have considered whether the result was one that testator would have wanted. Although Margaret could have done anything that she liked with her property, had she lived, there was no evidence that the testator would have left everything to Margaret's son if she had drawn the will after Margaret had died.⁹⁷ Like the court in *Casey*, the court in *Carroll* presumed that the testator would have wanted the antilapse statute to apply. When there is no indication of the testator's intent, however, it would be safer to presume that the testator would have intended to treat equally all persons similarly situated.

In *In re Estate of Ulrikson*,⁹⁸ the court applied the antilapse statute even though the result was unjust and easily avoidable. Testator's will, executed in 1971, made gifts of one thousand dollars to each of nine

95. *Id.* at 365-66, 291 P.2d at 977-78.

96. *Id.* at 366, 291 P.2d at 978. The court said that the intent to preclude application of the antilapse statute must be shown with reasonable certainty: "The testator is presumed to know the law and that the court will if possible read § 92 [the antilapse statute] into the will." *Id.* at 365, 291 P.2d at 977.

97. Indeed, the court held that the probate court properly refused extrinsic evidence offered to prove that the testator had intended to disinherit Margaret's son altogether on the ground that the will was not ambiguous. *Id.* at 364, 291 P.2d at 976.

98. 290 N.W.2d 757 (Minn. 1980).

nephews and nieces and to two nieces by marriage, and gave the residue of the estate to her brother and sister, "and in the event that either one of them shall predecease me, then to the surviving brother or sister."⁹⁹ The brother died in 1974, leaving two children who were among the eleven legatees. The sister died in 1975 without issue, and the testator died in 1976. The other nieces and nephews claimed that the statute should not be applied to pass the residue of the estate to the brother's issue, but that the property should pass intestate, in which case, they all would share equally. As the result of applying the statute, two of the nine nieces and nephews received the residue of the estate while the other seven received only one thousand dollars each.

The court affirmed the trial court's application of the statute, finding that the words of survivorship were intended to be effective only if there was a survivor.¹⁰⁰ The court recognized that the testator most likely did not contemplate that both her younger brother and sister would predecease her, and that the residuary clause did not expressly dispose of the property under such circumstances.¹⁰¹ The court, however, applied the statute even though it perpetuated a pattern of inequality from one generation to the next without any evidence that testator would have wanted to treat her nephews and nieces unequally. The court mechanically held that the antilapse statute was free to operate regardless of the dispositive pattern it produced.

The result in *Bruner v. First National Bank*¹⁰² is equally questionable. Testator executed her will in August 1962, giving ten dollars each to her son Doc, her daughter Bertha, and her grandsons Floyd and Raymond. She intentionally made no other provision for, and otherwise expressly disinherited, these relatives. She then left the residue of her estate to her daughter Dressie.

Dressie died in 1965, leaving her son Raymond as her surviving issue. Testator died in 1966. The court applied the statute to give the residue of the estate to Raymond, despite the disinheritance provision, on the ground that the testator included the clause only to prevent his claiming as a pretermitted heir.¹⁰³ The court did not discuss the problem that application of the statute prolonged the inequality of treatment of the family members beyond the death of the favored child. Given the

99. *Id.* at 758.

100. *Id.* at 759-60. This same treatment of the survival requirement also was used in *Galoupe v. Blake*, 248 Mass. 196, 142 N.E. 818 (1924), in which the treatment produced a more equitable result.

101. *Ulrikson*, 290 N.W.2d at 759.

102. 250 Or. 590, 443 P.2d 645 (1968).

103. *Id.* at 593, 443 P.2d at 647.

fact that Raymond, the two children, and the other grandson were disinherited equally, it seems unreasonable to assume that the testator would have wanted Raymond to end up with the entire estate.¹⁰⁴

In *Estate of Roberts*,¹⁰⁵ application of the statute again produced an inequitable result. Testator executed her will in 1953. At that time, her son Archie had died, leaving two children, and her son Watkins was alive, with three children. Her will left ten thousand dollars plus real estate to each of Archie's children, ten thousand dollars plus real estate to one of Watkins' children, five thousand dollars to another, and one dollar to Watkins' final child. The residue she left to Watkins. Testator became incompetent in 1959 and remained so until her death in 1968. Her son, Watkins, died in 1964. The five grandchildren all survived the testator.

The court applied the antilapse statute to pass the residuary estate to Watkins' three children, leaving out Archie's two children.¹⁰⁶ The court rejected the arguments that the gift of one dollar to one of Watkins' children showed an intent that the statute should not be applied, and that the grandchildren should be treated as pretermitted heirs as to the residue. The court stated that "[t]o render the statute inoperative, 'a contrary intent on the part of the testator must be plainly indicated.'"¹⁰⁷

As the cases discussed above indicate, antilapse statutes often can produce unfair results. Courts have applied the statutes so as to give a windfall to relatives who would otherwise receive little, if anything, from the estate and have ignored the fact that members of the same generation receive grossly disproportionate shares. By presuming that antilapse statutes should be applied and by refusing to consider their effect on the

104. The court noted that the testatrix lived for more than a year after Dressie's death, "during which time she could have changed her will and disposed of her estate so as to exclude Raymond and the other persons named as being 'disinherited' if that was her purpose." *Id.*

105. 9 Cal. App. 3d 747, 88 Cal. Rptr. 396 (1970).

106. *Id.* at 753, 88 Cal. Rptr. at 399.

107. *Id.* at 752, 88 Cal. Rptr. at 398 (quoting *Estate of Steidl*, 89 Cal. App. 2d 488, 490, 201 P.2d 58, 60 (1948)); see also *Estate of Pfadenhauer*, 159 Cal. App. 2d 686, 324 P.2d 693 (1958); *Carroll*, 138 Cal. App. 2d 363, 291 P.2d 976.

In *Estate of Salisbury*, 76 Cal. App. 3d 635, 143 Cal. Rptr. 81 (1978), the court was able to avoid applying the statute when it would have produced a result similar to *Roberts*, because the testator had included in the residuary clause "all failed and lapsed gifts." *Id.* at 638, 143 Cal. Rptr. at 82. The testatrix had devised real property to her brother and the residue to her two grandchildren. The brother predeceased her, leaving two daughters who survived the testatrix. The question before the court was whether the brother's daughters or the testatrix' grandchildren should take the property devised to the brother. The court held that the reference to failed and lapsed gifts in the residuary clause indicated an intention that the antilapse statute should not be applied. *Id.* at 643, 143 Cal. Rptr. at 86. As a result, the grandchildren took, rather than the brother's issue.

dispositive plan, courts have often reached results that are contrary to the intent of the ordinary testator.

The Statute Fails to Recognize All Family Relationships by Consanguinity and Affinity

Other cases that illustrate problems arising under antilapse statutes are those in which devises to relatives could not be saved because the relatives did not come within the protection of the state's antilapse statute. Three cases illustrate these types of problems.

In *In re Estate of Minor*,¹⁰⁸ the testator left the residue of her estate, all of which she had received from her deceased husband, to her husband's sisters, Mary and Emily, to the only child of his deceased brother John, and to the three children of his deceased brother Henry. Mary and Emily predeceased the testator, and Mary left two daughters. The court held that the interests of the sisters-in-law lapsed and affirmed a decree distributing the entire estate to the descendants of John and Henry, eliminating the descendants of Mary despite evidence that testator was not well acquainted with any of these relatives.¹⁰⁹

When the testator has made a devise to relatives by marriage, it is difficult to argue that substituting their issue under the antilapse statute would produce results that the average testator would not want. If the testator had wanted to keep the property on her side of the family, she would not have passed it to the other side in the first place. California's statute recently has been amended to recognize that the average testator's intent more likely will be carried out by a statute that covers devises to all relatives, whether related by consanguinity or affinity.¹¹⁰

Whether the antilapse statute should be extended to cover the testator's spouse, as well as the spouse's relatives, is a more difficult issue. If the testator made a gift to in-laws, there is no doubt that he intended to include at least some people outside his nuclear family or blood relations. If the gift is to the spouse, however, the situation is different. Empirical studies show that testators in overwhelming proportions leave their prop-

108. 59 Cal. App. 616, 211 P. 807 (1922).

109. The language of the residuary clause stated, "To each of the following named persons as may be living at my decease, their heirs and assigns respectively . . ." *Id.* at 617, 211 P. at 808. The principal argument was that the phrase "their heirs and assigns" should be read as a substitutionary gift. *Id.* at 618-19, 211 P. at 808-09. The court rejected this interpretation. In awarding the entire estate to the descendants of John and Henry, the court must have proceeded on the theory that testator had made a class gift even though she named the takers. *Id.* at 619, 211 P.2d at 809. Presumably the appellants did not even argue for application of the antilapse statute because it did not apply to relatives by affinity.

110. CAL. PROB. CODE § 6147(a) (West Supp. 1986).

erty to the surviving spouse.¹¹¹ They do so even when they have children who are not also children of that spouse, although with lesser frequency.¹¹² In this situation, if the spouse predeceases, it usually would not be the testator's intent to pass the property to the issue of the predeceased spouse rather than to the testator's own issue. Hence, there is a reluctance to include spouses within the antilapse statute's coverage.¹¹³

However, if the testator has no children of his own and leaves his entire estate to his spouse, who predeceases him leaving issue, it frequently would carry out the testator's intent to pass the property to the stepchildren, particularly if they were raised in the testator's home. In *Jackson v. Schultz*,¹¹⁴ for example, testator, who had no children of his own, married Bessie in 1918. He cared for and supported her three children. His will, executed in 1937, gave all of his property to his "beloved wife . . . to her and her heirs and assigns forever."¹¹⁵ Testator died in 1958, five years after Bessie died. He had no living kin. Because he had included the language of heirs and assigns, the court was able to read "and" as "or" and find a substitutionary gift to Bessie's three children.¹¹⁶ Use of the antilapse statute in this type of situation would provide much more predictable results.

If there are children of both spouses by prior marriages, problems arise that probably cannot be solved by an antilapse statute. For instance, in *In re Estate of Sowash*¹¹⁷ the testator left his estate to his wife with the request that she divide it in her will, one-half to her children from her prior marriage and one-half to his children. She predeceased the testator. The court held that she was not covered by the antilapse statute and that all of the property passed to his issue by intestacy.¹¹⁸ Applying the antilapse statute to pass all the property to her issue, ex-

111. M. SUSSMAN, J. CATES & D. SMITH, *supra* note 22, at 86-87, 89-90; Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1307-09 (1969); Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 252-53 (1963); Fellows, Simon & Rau, *supra* note 20, at 351, 359, 364; Fellows, Simon, Snapp & Snapp, *supra* note 21, at 725-26, 728-30; Contemporary Studies Project, *supra* note 21, at 1084-85, 1095-96; Note, *Intestate Succession in New Jersey: Does It Conform to Popular Expectations?*, 12 COLUM. J.L. & SOC. PROBS. 253, 278 (1976).

112. See Fellows, Simon & Rau, *supra* note 20, at 366; Contemporary Studies Project, *supra* note 21, at 1094-95.

113. Iowa's antilapse statute, which originally applied to all devisees, was amended in 1963 to exclude the testator's spouse. See *supra* note 44.

114. 38 Del. Ch. 332, 151 A.2d 284 (1959).

115. *Id.* at 333-34, 151 A.2d at 285.

116. *Id.* at 335-36, 151 A.2d at 286.

117. 62 Cal. App. 512, 217 P. 123 (1923).

118. *Id.* at 515, 217 P. at 125.

cluding his, however, would have led to a result that would have been even further from what the testator intended.

Although it seems clear that the testator would have preferred a result that would split the property between the two groups of issue, there does not seem to be any way to reach that result by applying an antilapse statute. A statute that would take the property intended for a predeceased spouse and split it among the testator's issue and the spouse's issue would carry out the testator's intent part of the time, but it would certainly frustrate his intent just as often. In the absence of a clear basis for predicting the wishes of most testators in this situation, it is probably better to leave this problem in the hands of the drafters and the courts.

The Statute Fails to Recognize Close Relationships with Persons Not Related by Blood or Marriage

A final problem arises in cases involving devises to people who were treated like family by the testator, but whose relationships are not recognized under the antilapse statute, either because they were not related by blood or marriage, or because the relationship had been severed by adoption.

In *Estate of Connolly*,¹¹⁹ the Wisconsin court was unable to save a testamentary gift for the family of the testator's close friend because the devisee was not related by blood. Testator died in 1971 at the age of 83. She was survived by blood relatives consisting of two nieces, a grandniece, a grandnephew, and four great-grandnieces and nephews. She had last seen one niece in 1957 and had seen none of her other relatives since 1935.

Her will left five hundred dollars to her nursing home, five hundred dollars to the Little Sisters of the Poor, one thousand dollars for the saying of Masses, and her jewelry to Marne McElligott Shay, the daughter of the residuary legatee. The testator left the residue of her estate to Mrs. Robert McElligott, "who has been my friend and has been most kind and helpful for the past many years."¹²⁰ Her will stated that she did not wish to leave anything to her relatives.

There was evidence that testator had been very close to the McElligott family. Since at least 1940, she had spent holidays with them. After she moved to a nursing home, Mrs. McElligott managed her financial affairs under power of attorney, and the McElligott children visited her

119. 65 Wis. 2d 440, 222 N.W.2d 885 (1974).

120. *Id.* at 443, 222 N.W.2d at 887.

frequently. Mrs. McElligott predeceased the testator. The court rejected all arguments aimed at saving the gift for the McElligott children.¹²¹ The residue passed intestate despite testator's expressed intent that her relatives receive nothing from her estate. The basic problem, of course, was that the Wisconsin antilapse statute protected only gifts to relatives.

Similarly, in *In re Estate of Hittel*¹²² the testator left his entire estate to Anna and Mary, "with whom I live . . . and whom I regard and treat as my adopted daughters."¹²³ He expressly stated that he left nothing to his brother, sister, nieces, or nephews because of their secure financial positions. Mary predeceased the testator and the court held that the testator's heirs took her half of the estate:

As in the case of innumerable wills, the testator did not anticipate changed conditions, and did not provide for the event of the death during his lifetime of one of the named devisees, which he could easily have done, if he so desired, by giving the property to them or to the survivor of them. What his actual intent may have been after the conditions were changed by the death of Mary we have no means of knowing, except from the fact that he allowed the will to stand as originally executed.¹²⁴

In *Hittel*, the California court could not save the gift for Anna by using the class gift doctrine because testator had named the sisters, but some courts have been able to overlook the naming of the beneficiaries to save gifts to close friends or "virtual" family of the testator using the

121. The McElligott children made five arguments: the disinheritance clause prevented the heirs from taking intestate; the combination of the residuary and disinheritance clauses rendered the will ambiguous and raised the presumption that the testator intended not to die intestate; there was a void in the will and a gift by implication should be found; the probable intent doctrine should be adopted; and the antilapse statute denied equal protection. *Id.* at 446, 451-52, 454, 222 N.W.2d at 888, 890-92. In rejecting the probable intent doctrine, the court gave the following reasons:

The adoption of this doctrine would open a great many wills to attack by disappointed relatives or friends of the deceased and would interject an element of uncertainty and lack of finality into the process of testamentary disposition. While the doctrine does have a certain attractiveness, in cases, as here, where an unforeseen consequence will result in the lapse of a residual gift and the distribution of such property, through intestate succession, to legal heirs whom the testator had specifically attempted to disinherit, the adoption of such a principle would require the reversal of a substantial body of Wisconsin case law. . . . Adopting the "doctrine of probable intent" . . . would allow a court to independently ascertain the intent of the testator absent any language in the will which would be of guidance. Such a rule would bear the unpleasant appellation "judicial will drafting"

Id. at 453-54, 222 N.W.2d at 891-92.

122. 141 Cal. 432, 75 P. 53 (1903); see also *Estate of Sessions*, 171 Cal. 346, 153 P. 231 (1915) (statute's coverage too narrow to protect gifts to those about whom the testator cared most).

123. 141 Cal. at 433-34, 75 P. at 53.

124. *Id.* at 436-37, 75 P. at 54.

class gift doctrine.¹²⁵ Their ability to do so, however, rests entirely on the fortuitous circumstance that the testator had more than one person to whom she wanted to leave her property.

In *In re Devin Estate*,¹²⁶ the court was able to save the gift to a nonfamily beneficiary using the class gift doctrine. In that case, the testator made eleven monetary bequests to individuals, including five thousand dollars to her second cousin and heir, Martha Conway, and five charitable gifts, and then left the residue of the estate to the two Frost sisters "and their heirs and assigns."¹²⁷ One of the sisters predeceased the testator. The court admitted evidence that testator lived within one-half mile of the sisters and that the three were close friends, while her heir was a second cousin who lived three thousand miles away. The court held that the surviving sister took the entire residue:

We determine that the will as a whole when read in the light of all the attending circumstances shows that the testatrix desired that the residue of her estate should be confined to the residuary legatees. We apply the class gift concept to effectuate her real purpose. . . . If Miss Devin had intended that Martha Conway should take part of the residue in the event one of the Frost sisters predeceased her, it is improbable that she would choose to let it pass by intestacy instead of saying so in the will.¹²⁸

Finally, *Estate of Goulart v. Amaral*¹²⁹ presents a particularly glaring failure of judicial common sense or creativity, and perhaps a failure of the antilapse statute. Testator, who was born in 1878, came to California from the Azores in the early 1900's to live with Mr. and Mrs. Jose Amaral. After the 1951 enactment of a civil code amendment permitting adoption of adults,¹³⁰ Jose Amaral adopted testator. Amaral's wife already had died. Amaral then died in 1953 and left his entire estate to

125. See *infra* notes 126-28 & accompanying text.

126. 108 N.H. 190, 230 A.2d 735 (1967).

127. *Id.* at 191, 230 A.2d at 735.

128. *Id.* at 191-92, 230 A.2d at 736. A similar case is *In re Estate of Moloney*, 15 N.J. Super. 583, 83 A.2d 837 (1951), in which the court used either the class gift concept or the residue of a residue rule to save the devise to four named children of the testator's uncle. The court reasoned that the testator unquestionably "intended that the small bulk of her estate should pass only to her said uncle's children" who were not covered by the antilapse statute. *Id.* at 591, 83 A.2d at 841.

In *Estate of Mangel*, 51 Wis. 2d 55, 186 N.W.2d 276 (1971), testator's will left his entire estate to his wife "and to her heirs and assigns forever . . ." *Id.* at 57, 186 N.W.2d at 277. She predeceased him, but the court saved the gift for her son from a previous marriage, holding that "heirs and assigns" was ambiguous so that extrinsic evidence could be admitted showing that this would have been testator's intention. *Id.* at 65-69, 186 N.W.2d at 281-83.

129. 222 Cal. App. 2d 808, 35 Cal. Rptr. 465 (1963).

130. Act of 1872, ch. 880, § 2, 1951 Cal. Stat. 2400 (codified at CAL. CIV. CODE § 227(p) (West 1985)).

testator. Testator died in 1960, leaving her entire estate to her brother and two sisters in the Azores. One sister and the brother had predeceased her, leaving issue. The court held that the antilapse statute did not apply to save the property for the testator's nieces and nephews because her natural brothers and sisters were no longer her kindred.¹³¹ The adoption had severed her natural kin relations. Thus, two-thirds of the property lapsed and passed to her intestate takers, a sister of Jose Amaral and the descendants of his deceased brothers and sister, all of whom unsuccessfully had contested his will leaving the property to her in the first place. It is hard to imagine a more mechanical and literal application of a statute than this, or a result that would have pleased the testator less.¹³² Although it is difficult to believe that it should be necessary, the antilapse statute should be amended to include devises to natural relatives, whether or not the relationship has been severed by adoption. If testators care enough about their natural relatives to leave them property, there should be no reason not to preserve it for the relatives' issue.

Conclusions

As the above discussion demonstrates, the antilapse statutes generally produce good results when they operate to maintain equality within the family and prevent property from passing outside the family.¹³³ They usually produce inappropriate results, however, when they operate to prolong an inequality intended in one generation into the next.¹³⁴ Antilapse statutes that stop short of protecting gifts to all those who stand in a familial relation to the testator, whether by blood, marriage, or affection are too narrow.¹³⁵ In addition, the statutes should cover gifts to spouses when the testator has no children of his own.¹³⁶

The requirement that antilapse statutes apply unless a contrary intent appears in the will is unduly rigid, as is the implicit presumption that application of an antilapse statute will invariably carry out the intent of

131. *Goulart*, 222 Cal. App. 2d at 823-24, 35 Cal. Rptr. at 475.

132. The court recouped somewhat when, in a subsequent case, it held that her intestate takers were not entitled to be classified as relatives for inheritance tax purposes on the ground that: "[the] facts show no social consideration, either general or rooted in the personal relationship of decedent and appellants, to warrant extension of the literal language of the tax act." *Estate of Goulart v. Cranston*, 242 Cal. App. 2d 811, 814, 51 Cal. Rptr. 808, 810 (1963). However, it is difficult to understand why they could not have taken the same approach toward application of the adoption statute that substituted the adoptive family for the natural family. There was no reason to apply it to this situation.

133. *See supra* notes 71-87 & accompanying text.

134. *See supra* notes 88-107 & accompanying text.

135. *See supra* notes 108-10, 119-32 & accompanying text.

136. *See supra* notes 111-16 & accompanying text.

the average testator.¹³⁷ Whether a will contains survival conditions and disinheritance clauses is not an adequate ground for deciding the applicability of the statute. Only by examining the dispositive pattern of the will as applied to the surviving family of the testator can courts make intelligent decisions as to whether substituting the issue for a predeceased devisee will promote or frustrate the normal testator's intent. The cases demonstrate, however, that under current statutes most courts have been unwilling or unable to take this sensible approach. Instead, they have focused on highly artificial arguments based on the presence or absence of survival language or other formal phrases in the will in their search for the testator's intent. Although a shift in judicial approach could do much to alleviate the problems revealed by the cases, a more direct solution would revise the antilapse statutes so that they discriminated among dispositive plans and applied only when the ordinary testator would probably want the issue substituted for the predeceased beneficiary. The next section explores the outlines of such an antilapse statute.

The Language and Operation of an Improved Antilapse Statute

The Basic Structure of the Statute

Ideally, an antilapse statute should apply when, but only when, the usual testator would prefer that the property left to a predeceased legatee would pass to that legatee's surviving issue.¹³⁸ Seven representative situations are described below. From empirical studies of testamentary preferences,¹³⁹ from the case law, and from our common experience, we reasonably can conclude that the average testator would prefer that the gift be saved under the first four of these situations. Testators probably would prefer that a gift be saved under the fifth and sixth situations, and they would almost certainly prefer that the gift lapse in the seventh. The seven situations are as follows:

1. The testator has made a gift to a family member and has given the residue of the estate to charity. Saving the gift in this situation keeps the property within the testator's family group and prevents it from passing outside the family.
2. The testator has made substantially proportionate devises of property to all the family members of one generation and to the issue of each deceased member of that generation who left surviving issue.

137. See, e.g., *supra* note 93 & accompanying text.

138. Heirs or devisees are included under the Maryland statute; heirs are included under Iowa's statute. See *supra* notes 53-54.

139. See *supra* notes 20-22, 111.

Saving the gift here maintains equality of distribution among the branches of the testator's family.

3. The testator, who has no issue, leaves the entire estate to his or her spouse. In the event of lapse, the property would pass to relatives expressly disinherited by the testator, or to the state by escheat. Saving the gift in this circumstance passes the property to the testator's stepchildren or their issue, rather than to persons whom the testator explicitly did not want to benefit.

4. The testator leaves the estate to close friends, and either has no living relatives or expressly has disinherited the intestate takers. Saving the gift in this situation prevents the property from passing by escheat or from passing to takers whom the testator has expressly indicated should not receive it.

5. The testator, who has no issue, leaves property to a spouse who has issue. In the event of lapse, the property either will pass under a residuary clause in favor of an institutional taker, or by intestacy to relatives who have not been disinherited, but who were not close to the testator during life. In this situation, distributing the property intended for the predeceased spouse to his or her surviving issue often would carry out the testator's intent, but it certainly would not always do so.

6. The testator leaves the entire estate, the residue of the estate, or a substantial devise to a friend. In the event of lapse, the property either will pass under a residuary clause in favor of an institutional taker, or by intestacy to relatives who have not been disinherited, but who were not close to the testator during life. In this situation also, distributing the property to the friend's surviving issue will often, but not always, carry out the ordinary testator's probable intent.

7. The testator makes a disproportionate gift to one or more members of an older generation who die before the testator, and there are issue of the preferred members as well as issue of other members of that generation alive when the testator dies. Saving the gift in this event would result in a disproportionate distribution of the testator's property among branches of the family, or among members of the family who are similarly situated in relation to the testator. Permitting the gift to lapse would probably carry out the testator's intent because it would result in a more equitable distribution among members of the family.

An antilapse statute drafted so that it applied according to the type of family situation or type of disposition would function more effectively than current statutes. If carefully drawn, the statute should operate without provoking additional litigation. Indeed, there probably would be less litigation than under current statutes because there would be fewer

cases in which the statute produced a patently unfair result.¹⁴⁰ Such a statute would not require that courts resort to more extrinsic evidence than they currently admit, because courts only would be required to examine the pattern of dispositions made in the will to determine whether or not to apply the antilapse statute.¹⁴¹

By combining a limitation on the situations in which the statute should be applied with a broader definition of the devisees that a testator probably would want covered, legislatures can make substantial improvements to all existing antilapse statutes. The statutes no longer should apply to all devises to a particular group of defined persons regardless of the dispositive pattern, nor should they exclude all devises to people who do not fall within the defined group regardless of the possible alternative disposition of the property that will be made if the devise lapses. By limiting the application of the antilapse statutes to those situations in which there is a basis for believing that the average testator would prefer that the predeceased beneficiaries' surviving issue be substituted as takers, the major problems with current antilapse statutes can be eliminated. This discriminating approach should result in substantial improvement in the functioning of antilapse statutes without requiring courts to consider extrinsic evidence other than the testator's dispositive plan and the composition of the testator's surviving family.

Legislatures should broaden the scope of most antilapse statutes to cover devises to spouses and virtual family members, as well as all relatives by affinity and consanguinity. The statutes that cover all devisees could be narrowed to this group to avoid the risk of overbreadth—saving gifts that the testator would have preferred return to the residuary or to intestate takers. Except in the case of gifts to the spouse, however, common sense suggests that gifts to nonrelatives who are not virtual family are usually not of significant value and need not be of much concern. The risks of the overbroad statute are considerably less than the risks of frustrating the testator's intent imposed by a narrow statute that does not

140. In a different context, Professor Halbach has written of the problems presented by conflicting rules of construction, and by intent-defeating rules. He concludes:

Certainly undesirable is the common situation in which there will exist two opposed *general* rules of construction which are equally applicable to the facts before the court, for the effect of such conflicting rules is simply to liberate the court to reach whichever result it thinks best and to destroy predictability. Even worse, however, is the intent-defeating rule which a conscientious judge feels he must circumvent to reach a just result.

Halbach, *supra* note 2, at 328 (emphasis in original).

141. Extrinsic evidence would, of course, be required to establish the identity of the family members and to which generation they belong, but when this is based on a blood or marriage relationship, the statute would add nothing new.

include those friends who have replaced or displaced the testator's consanguineous relatives in his affections.

Of course, defining all of the situations in which the testator most likely would prefer the issue of the spouse or friend over the alternate takers in the event of lapse is difficult, but the clear cases can be identified. Even if the statute only covers those situations, it will produce substantially better results than the current statutes.

A gift that would otherwise escheat to the state or pass to persons expressly disinherited by the will almost certainly should be saved.¹⁴² Both of these situations would apply equally to gifts to the spouse and to the friend. In the case of a gift to the spouse, courts must distinguish the genuine disinheritance clause from the clause inserted only to avoid claims of pretermisison.¹⁴³ If there are lineal descendants of the testator, any doubt about the intended effect of a disinheritance clause should be resolved in favor of passing the property to testator's lineal descendants.

If the testator has no lineal descendants and gives his property to the spouse, the statute should apply to pass the property to the spouse's issue when it seems likely that the testator would prefer them to the alternate takers. This preference seems reasonable, for example, if the stepchildren have lived with the testator. Moreover, if the alternate takers are relatives who were not close to the testator in life, it also seems likely that the testator intended that his spouse's children should receive the property. Beyond these two situations, however, the normal testator's preference is less predictable.

Similarly, if the testator has left the entire estate, or the residue of the estate, to the spouse, and there are children of the testator and the spouse, as well as the spouse's other children who are half bloods to the testator's children, one could argue that the antilapse statute should apply. This is especially true if all the children were raised in the same household. However, the statute should include not only the spouse's issue, but also any other issue of the testator who are not also issue of the spouse. It is questionable whether there is a sufficiently consistent preference in these situations to warrant complicating the statute sufficiently to cover them. The problem of step-families is a growing one, however, and it might be worth addressing.

142. This would prevent cases like *Starkey v. District of Columbia*, 377 A.2d 382 (D.C. 1977) (The court refused to save a gift to a residuary devisee, either for his issue or for the remaining residuary legatees, because of a general survival requirement even though the result was escheat.).

143. This caution applies to disinheritance clauses generally. If there is doubt that a disinheritance clause was intended to apply to cut out lineal descendants or close relatives, it should not be given that effect.

When the testator leaves the entire estate or the residue to a friend, it seems fairly certain that the friend is close enough to be considered the testator's "virtual family" and the gift should be saved, even if the will contains no express disinheritance of the intestate takers. If the devise to the friend is part of a residuary clause that includes other takers, the question arises whether the average testator would prefer the friend's issue over the surviving residuary takers.

Adoption of the residue of a residue rule¹⁴⁴ provides a solution to cases like *Estate of Hittel*¹⁴⁵ and produces the same result as that reached in *In re Devin Estate*.¹⁴⁶ The difficult question arises when there are two or more residuary legatees: Would the average testator prefer the issue of the predeceased legatee or the surviving residuary takers? One way to resolve this question is to consider whether the testator has included a survival requirement in the will. If so, the surviving residuary takers should take the property. If not, the court should substitute the legatee's issue. The rationale for this result is that, if the testator cared enough to include the person in the residuary devise, he probably regarded the person as family, and the person should be treated no differently than a collateral relative. Thus, the devise should pass to the surviving issue of the predeceased legatee unless the testator has stated expressly that the residue passes to the surviving residuary takers. Even then, the court should substitute the issue if there are no surviving residuary takers.

The preresiduary devise is the most difficult problem to resolve. If the devise is of a substantial part of the estate, the testator probably regarded the devisee as virtual family. However, what is the test for deciding whether the devise is substantial? This decision presents as much risk of difficult litigation as does the decision whether the testator regarded the devisee as "virtual family." When the testator leaves a substantial devise to the friend and then leaves the residue to an organization or an entity other than a natural person, the testator may well have preferred the issue of the predeceased friend to the charity or other organization, but it is hard to be confident of that conclusion. If the alternate takers are relatives who have not been expressly disinherited, the problem is also difficult. In the absence of a clear indication that the testator would prefer substituting the nonrelative's issue, it is probably best to leave the

144. The modern trend is toward adoption of the rule that a lapsed residuary devise passes to the other residuary takers instead of passing intestate. See, e.g., CALIF. PROB. CODE § 6148(b) (West Supp. 1986); UNIF. PROB. CODE § 2-606 (1969).

145. *In re Hittel*, 141 Cal. 432, 75 P. 53 (1903); see *supra* notes 122-24 & accompanying text.

146. *In re Devin Estate*, 108 N.H. 190, 230 A.2d 735 (1967); see *supra* notes 126-28 & accompanying text.

preresiduary devise where it currently stands in most states—outside the protection of the antilapse statute.

Additional Aspects of the Statute

Class Gifts

The antilapse statute clearly should apply to class gifts. Almost all states have come to this conclusion.¹⁴⁷ The question with respect to class gifts is whether the statute should draw any distinction between the issue of a class member who already is deceased when the will is drawn, and the issue of the class member who dies after execution of the will, but before the testator. The statutes in five states make that distinction.¹⁴⁸ Twenty-two states expressly refuse to do so.¹⁴⁹

The rationale for distinguishing between the issue of class members who died before and after execution of will is that, in drawing his will, the testator must have known about the deceased class member. If the testator made the gift to his brothers and sisters without mentioning the issue of a deceased sibling, the probabilities are high that he did not intend to include them. However, no such conclusion can be drawn about the issue of a sibling who is alive when the will is drawn and who later dies.

While this view is entirely reasonable, these statutes present a severe problem in operation. The problem is well illustrated by the Florida case, *Drafts v. Drafts*,¹⁵⁰ in which the court imposed the distinction as a matter of common law. It was not required by the state's antilapse statute. In *Drafts*, the testator left his estate as a class gift to his brothers and sisters. When the will was drawn, there were two living brothers, two living sisters, and three deceased brothers with living issue. Between the execution of the will and testator's death, one brother and one sister died, both leaving issue. The court held that the brothers who died before execution of the will were not covered by the statute. As a result, the devise was shared by the brother and sister living at testator's death and by the nieces and nephews whose parents died after execution of the will. The nieces and nephews whose parents died before execution of the will were excluded. This distribution almost certainly is not one that the tes-

147. See *supra* notes 56-59.

148. The five states are California, Maryland, New York, Oregon, and Wisconsin. See *supra* note 58.

149. See *supra* note 57.

150. 114 So. 2d 473 (Fla. Dist. Ct. App. 1959). Florida has since changed its statute by adopting the Uniform Probate Code provision. See FLA. STAT. ANN. § 732.603 (West 1976).

tator would have chosen.¹⁵¹

Two different solutions to this problem might be adopted. One solution includes the issue of all deceased class members, no matter when they died. This alternative has been chosen by twenty-two states, including Florida, whose statute was changed after the *Drafts* case.¹⁵² The other solution is to include the issue of predeceased class members only if there was no deceased class member with living issue at the time the will was drawn. If there was a deceased class member with living issue at the time the will was drawn, then none of the issue of predeceased class members take whether the class member died before or after execution of the will, unless all class members predecease the testator, in which case all of the issue should take by right of representation. This solution is probably the disposition that the testator would have made had he confronted the possibility that additional class members might die before he did.

Effect of Survival Requirements in the Will

Courts have tended to accord too much significance to survival requirements when deciding whether to apply antilapse statutes.¹⁵³ The results of the cases involving survival requirements are quite haphazard. It seems clear that the presence or absence of survival language alone should not be determinative of the question of whether a court should substitute a predeceased devisee's issue.

An antilapse statute could handle survival language in different ways. One approach would treat the language as creating an ambiguity about the testator's intent, which would permit the introduction of extrinsic evidence to determine the question whether the court should substitute the issue for the predeceased devisee. The problem with this approach is that it opens the door to increased litigation or to the introduction of evidence of the kind that courts have been very reluctant to admit in probate matters.

Another approach would be to provide a more discriminating set of rules governing the effect of survival language appearing in a will. The rules could be based on the assumptions that a testator rarely intends to disinherit a branch of his lineal descendants, but he does intend with

151. As noted earlier, the antilapse statute produces or perpetuates inequality of treatment from one generation, when it probably is intended, to the next, when it most likely is not. See *supra* text accompanying notes 88-107.

152. *Drafts v. Drafts*, 114 So.2d 473 (Fla. Dist. Ct. App. 1959); see *supra* note 150 for the Florida statute and note 57 for the 22 states that changed after *Drafts*.

153. See *supra* notes 67, 74, 98.

some frequency that property given to collateral relatives, relatives by affinity, and friends pass to someone other than their issue if they predecease him.¹⁵⁴

These assumptions would support the conclusion that the testator probably did not include bare survival language with the expectation that it would disinherit a branch of his lineal descendants by excluding the issue of a predeceased devisee.¹⁵⁵ On the other hand, if he has included survival language in a gift to siblings or friends, these assumptions would support the conclusion that he probably did intend to exclude the issue unless the entire group predeceases him, or unless the result of not substituting the predeceased devisee's issue would be to pass the property to those he expressly has disinherited or to the state by escheat.¹⁵⁶

To implement this approach, the antilapse statute should require additional evidence to support any different conclusion as to the intended effect of survival language included in the will. The statute might follow the model restricting the additional evidence to that appearing in the will, such as directions that gifts should lapse. However, this approach seems unduly restrictive. Evidence normally admissible in construing wills, including the facts and circumstances surrounding testator at the time the will was executed, also should be admissible.

Identity of Substituted Takers

There is almost universal agreement in state antilapse statutes on substituting the issue for the predeceased devisee. Only Maryland gives

154. The Pennsylvania antilapse statute recognizes that a testator will seldom wish to prevent a gift to a brother or sister from lapsing if the testator has a spouse or issue. The statute expressly provides that a devise to a brother or sister, or to the child of a brother or sister, lapses "to the extent . . . [that] it will pass to the testator's spouse or issue as a part of the residuary estate or under the intestate laws." 20 PA. CONS. STAT. ANN. § 2514(9) (Purdon 1975).

155. See *Schneller v. Schneller*, 356 Ill. 89, 190 N.E. 121 (1934), discussed *supra* notes 85-87 & accompanying text.

156. See, e.g., *In re Robinson*, 37 Misc. 2d 546, 236 N.Y.S.2d 293 (Surrogate's Ct. 1963). In *Robinson*, testator left the residue of his estate to three brothers and three sisters, "or to the survivor or survivors of them" *Id.* at 546, 236 N.Y.S.2d at 294. Two of these siblings predeceased testator leaving issue. The court refused to apply the antilapse statute so that the surviving brother and sister took the entire residue. *Id.* at 550, 236 N.Y.S.2d at 297. The court based its finding on the fact that, prior to the execution of the will, four siblings of the testator had died leaving 13 children. *Id.* at 549-50, 236 N.Y.S.2d at 296-97. Because testator did not provide for these nieces and nephews in his will, it seems likely that he did not intend to benefit the descendants of the siblings he named in his will.

The court distinguished the *Schneller* case, discussed *supra* notes 85-87 & accompanying text, on the ground that there was a strong motivation to apply the statute in that case, despite the survival requirement, because the result of not applying it would have been to disinherit a grandchild. *Id.* at 549, 236 N.Y.S.2d at 296.

the predeceasing legatee the power to determine the devolution of the interest.¹⁵⁷ England's statute, which originally followed the Maryland pattern, was amended in 1982 to provide for substitution of issue only.¹⁵⁸ The reason for making the change was to ensure that the property went to the grandchildren instead of to the devisee's creditors or into the residuary estate.

Proposed Antilapse Statute

An antilapse statute designed along the lines discussed should provide as follows:

1. A devise to a person who is related to the testator, who dies before the testator, whether before or after the will is executed, does not lapse if:
 - (a) The residue of the estate is devised to any organization, association, or entity other than a natural person; or
 - (b) The testator has disposed of the estate so that substantially proportionate amounts are devised to all other members of the same generation and class of relationship to the testator as the devisee, and to the issue of all deceased members of that same generation and class who are survived by issue.
2. A devise to a person who is related to the testator does lapse if:
 - (a) the testator has disposed of the estate so that a substantially disproportionate amount is devised to the branch of the family represented by the devisee, and
 - (b) lapse would result in a more equal distribution to the members of generations younger than the devisee who occupy positions of relationship to the testator of equal degree, or a more equal distribution among the branches of the family.
3. A devise to a person who is not related to the testator, including the testator's spouse or former spouse, does not lapse if:
 - (a) the property would otherwise escheat; or
 - (b) the property would otherwise pass to persons expressly disinherited by the will; or
 - (c) the devise is of the entire estate or residue of the estate and the testator has no lineal descendants; or
 - (d) the devise is substantial in value and the residue is devised to an organization, association, or an entity other than a natural person.¹⁵⁹
4. A devise of substantially all of the estate, or the residue of the

157. MD. EST. & TRUSTS CODE ANN. § 4.403 (Supp. 1985).

158. 52 H. HALSBURY, HALSBURY'S STATUTES OF ENGLAND § 19, at 1974 (3d ed. 1982).

159. This subsection might well be omitted on the ground that drawing the line between substantial and insubstantial amounts might be more trouble than it is worth, or on the ground that in such situations the testator is as likely to prefer lapse because it will save the gift for the issue of the predeceased devisee.

estate, to the testator's spouse or former spouse¹⁶⁰ does not lapse if the issue of the spouse or former spouse include issue who are half blood relatives of the testator's issue, and they, or their parent, lived with testator while the issue were minors. Provided, however, that in any such case, all the issue of the testator, whether they are issue of the spouse or former spouse, shall share equally with the issue of the spouse or former spouse in the property devised to the spouse or former spouse. The distribution shall be made to all the issue per capita at each generation.¹⁶¹

5. Devisees who are related to the testator are those who are kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator.

6. A devise does not lapse if the devisee is survived by issue living at the time of the testator's death. The issue take in the place of the deceased devisee by right of representation.¹⁶²

7. Devisees under class gifts are treated the same as other devisees, whether they die before or after execution of the will, except that if a class member has died with surviving issue at the time the will is executed, and the testator knew that the class member was dead and that the class member had living issue, then none of the issue of class members who die before or after execution of the will shall be substituted under the statute. However, if all class members predecease the testator, the issue of all class members, whether they died before or after execution of the will, shall be substituted.

8. This statute does not apply either to save a devise from lapse or to cause it to lapse if the will expresses a contrary intention, makes a substitute disposition of the property, or if the resulting distribution would frustrate the will's dispositive plan.

9. Language of survival shall be given the following effect:

(a) Survival language in a devise to lineal descendants of the testator shall not alone prevent application of this statute, if the result of lapse would be to disinherit a branch of the testator's lineal descendants.

(b) Survival language alone in a devise to collateral relatives, relatives by marriage of the testator, or to other persons is sufficient to prevent application of the statute, unless there is other persuasive

160. This section would not apply to a devise to a former spouse that had been revoked by operation of law. No question of lapse can arise unless the devise would be effective except for the death of the devisee.

161. See CAL. PROB. CODE § 240 (West Supp. 1986) (definition of per capita at each generation); Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 NW. U.L. REV. 626, 632-33 (1971). This language has been chosen to make it clear that the spouse's children, the joint children, and the testator's children take equal shares rather than splitting the property into thirds or some other system. At the same time, the language covers the possibility that there may be more than one generation of takers.

162. Specifying that the issue take per capita at each generation might be a preferable alternative because it produces equality of distribution at each generational level rather than at the first generation only. See Waggoner, *supra* note 161.

evidence that the testator would not have intended the devise to lapse, or unless the result of lapse would be to pass the property to persons expressly disinherited by the will or to the state by escheat.

The major conceptual flaw in current antilapse statutes is that they assume that lapse always produces intent-defeating distributions, or that lapse of all devises to defined beneficiaries always produces intent-defeating distributions. The most important change called for by this Article is for courts and legislatures to recognize that these assumptions are not true. Lapse does not always produce intent-defeating distributions, and the relationship of the devisee to the testator is not alone a sufficient basis for discriminating among the situations in which devises should and should not lapse.

The purpose of the antilapse statutes should be to provide an alternative disposition of the property that will further the testator's dispositive plan. One modern approach to the lapse problem has been tried. That is the revolutionary "probable intent" doctrine of the New Jersey court,¹⁶³ in which the court seeks the disposition the particular testator probably would have wanted by considering any relevant admissible evidence. That approach has met with resistance because it opens the possibility that every case involving any substantial sum will be subject to litigation.¹⁶⁴

This Article suggests a different and evolutionary approach, which refines the current antilapse statutes by giving them a more discriminating application. Under this suggested approach, the statute uses both the identity of the beneficiaries and the nature of the dispositive plan to distinguish the situations in which lapse should be prevented from those in which it should be permitted to occur. The results are grounded in assumptions about the preferences of the ordinary testator drawn from empirical studies made in recent years.¹⁶⁵ The principal advantage of this approach over the probable intent doctrine is that the usual case will not require litigation to determine what should be done with property intended for the predeceased devisee.

Conclusion

Antilapse statutes have not been fundamentally changed since their late eighteenth-century inception. Two centuries of experience under

163. See *supra* note 63.

164. See, e.g., *Estate of Connolly*, 65 Wis. 2d 440, 222 N.W.2d 885 (1974) discussed *supra* notes 119-21 & accompanying text.

165. See *supra* notes 20-22, 111.

these statutes have shown that they apply too indiscriminately. Their coverage is often too broad in the number of situations to which they apply and too narrow with respect to the types of devisees covered. The statutes sometimes badly skew property distributions within a family and often cause inequality of distribution among the branches of a family. These blunt instruments of the eighteenth century should be reformed for twentieth-century needs.

This Article suggests narrowing the applicability of antilapse statutes to situations in which substitution of a predeceased devisee's issue is likely to produce the result the testator would have preferred. At the same time, it suggests broadening the statutes to cover devises to all of the people the testator would likely have intended to benefit. This broadening of coverage can be accomplished without going beyond the average testator's preference because the situations in which the issue will be substituted are limited. The principal change in focus suggested here provides a blueprint for significant reform of antilapse statutes so that they can perform their true function—providing a supplemental disposition of property for the testator too careless or too ill-advised to have drawn a complete and unambiguous will.

APPENDIX

AMERICAN & ENGLISH ANTILAPSE STATUTES

Takers Substituted by Antilapse Statute

	Issue of Devisee	Heirs	Heirs or Devisees
Children	S.C.		
Lineal Descendants	Ark. ¹ , Ill. ¹ , Ind., Miss., Tex., Gr. Brit. ¹		
Issue and Siblings	Conn. (child, grandchild, sibling), N.Y. ^{1,3} (issue and sibling), Pa. ^{1,4} (issue, sibling, and sibling's child)		
Lineal Descendant of Grandparent	Mich. ²		
Grandparent or Lineal Descendant Thereof	Ala. ² , Alaska ² , Ariz. ² , Colo. ² , Del. ² , Fla. ² , Hawaii ² , Idaho ² , Me. ² , Minn. ² , Mont. ² , N.J. ² , N.D. ² , Va. ² , Wyo. ²		
Relative/ Kindred/Kinship	Mass. ² , Mo., Neb. ² , Nev., N.M. ² , Ohio, Okla., Or. ^{1,3} , S.D., Vt., Wash., Wis. ^{1,3}		
Spouse and Kindred	Kan. (spouse, lineal descendant, or relative within six degrees)		
Kindred of Testator and Spouse	Cal. ^{1,3} (kindred or kindred of a surviving, deceased, or former spouse)		
Any Devisee	D.C., Ga., Ky. ¹ , N.H., R.I., Tenn. ² , W. Va.	Iowa (except spouse)	Md. ^{1, 5}
Other	N.C. ² (any devisee whose issue would have been an heir of the testator under Intestate Succession Act), Utah ² (heir of testator)		
No Statute	La.		

Takers Protected by Antilapse Statute

- 1 Statute expressly applies to class gifts, but does not mention void class gifts.
- 2 Statute expressly applies to void class gifts as well as to lapsed class gifts.
- 3 Statute does not apply to class members dead at execution of will (void class gifts).
- 4 Devise to sibling or issue of sibling will lapse if taker of lapsed devise would be testator's spouse or issue.
- 5 Statute does not apply to devisees dead at execution of will.

